Supreme Court, U.S.
FILED
941 991 JUN 5 - 1995
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No.

In The

Supreme Court of the United States

October Term, 1994

TRIOMPHE INVESTORS,

Petitioner,

vs.

CITY OF NORTHWOOD; JAMES CRANE; PATRICIA BELKNAP; JOHN MELNYK; RAYMOND LARK; JOHN E. BLAIR,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the appropriate standard of review for federal review of local zoning decisions on substantive due process grounds?

2. Whether it is necessary to establish a state law property or liberty interest as a prerequisite to a substantive due process claim?

3. Whether, despite a discretionary zoning ordinance, a property or liberty interest may arise from contract or implied contract principles?

4. Whether a local zoning decision may be predicated on unfounded community sentiment?

5. Whether, under the doctrine of "collateral estoppel," a state court can determine issues which establish a substantive due process claim as a matter of law?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Triomphe Investors, an Ohio General Partnership, consisting of the individual plaintiffs herein, James D. Haynes, Steven J. Linsenmeyer, and Jan Linsenmeyer (collectively "Triomphe"), and the respondents, the City of Northwood, James Crane, Patricia Belknap, John Melnyk, Raymond Lark, and John E. Blair, all then members of the Northwood City Council.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Triomphe Investors, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on March 7, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit,

dated March 7, 1995, is reported at 49 F.3d 198. It is reprinted in the appendix hereto, p. 1a, *infra*.

The opinion and order of the United States District Court for the Northern District of Ohio, Western Division (Zatkoff, D.J.), dated October 29, 1993, is reported at 835 F. Supp. 1036. It is reprinted in the appendix hereto, p. 14a, *infra*.

STATEMENT OF JURISDICTION

The jurisdiction of the District Court was invoked under 42 U.S.C. § 1983 and Section 1 of the Fourteenth Amendment to the Constitution of the United States of America. On November 2, 1993, the District Court for the Northern District of Ohio, Western Division, granted the individual respondents' motion for summary judgment on qualified immunity grounds, the respondents' motion for summary judgment with respect to petitioner's just compensation claim, and *sua sponte* dismissed petitioner's substantive due process claim thereby dismissing petitioners' lawsuit.

On petitioner's appeal, the Sixth Circuit, on March 7, 1995, entered a judgment and opinion upholding the District Court's dismissal of petitioner's substantive due process claim. Petitioner did not file a petition for a rehearing.

The jurisdiction of this Court to review the Sixth Circuit's judgment of March 7, 1995, is invoked under 28 U.S.C. § 1254(1) (1948), *as amended by* Act of June 27, 1988.

STATUTES INVOLVED

Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

> are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Northwood City Ordinance § 1266.09; Special Uses; Permits

> A special use permit may be granted in any of the established zoning districts.

Northwood City Ordinance § 1266.13; Criteria for Consideration

> The following criteria shall be used by the Planning Commission and Council in considering a special use application:
>
> (a) The special use is necessary or desirable for the public convenience at that location.
>
> (b) The special use is so designed, located and proposed to be operated that the public health, safety and welfare will be protected.
>
> (c) The special use will not cause substantial injury to the value of other property in the neighborhood in which it is to be located.
>
> (d) The special use conforms to the applicable regulations of the district in

> which it is to be located, including yard and height restrictions, and also conforms to the requirements for off-street parking as set forth in Section 1266.05.

STATEMENT OF THE CASE

A. Introduction

This Petition concerns the dismissal of Triomphe's Complaint against the City of Northwood, James Crane, Patricia Belknap, John Melnyk, Raymond Lark, and John E. Blair (hereinafter collectively referred to as the "City").

Triomphe interposed suit against the City for the arbitrary and capricious denial of Triomphe's application for a special use permit. Triomphe sued the City under the following theories: (1) just compensation takings claim; (2) procedural due process; (3) substantive due process; (4) state constitutional violations; and (5) tortious interference with business relations. The only claim remaining for the Court's consideration is the substantive due process claim.

B. Facts

In March, 1987, Triomphe Investors purchased a sixty (60) acre parcel of real estate, hereinafter referred to as the "property," located in the City of Northwood, Ohio, from the Chrysler Corporation. Triomphe purchased this property with the express intention of constructing condominiums upon a ten (10) acre section of the property.[1]

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1. It is very important to note that the City was aware of Triomphe's intention to construct condominiums at the time of the sale. One of the (Cont'd)

In its early history, the property was initially zoned as A-agricultural and RA-Rural Residential. On March 20, 1972, the City of Northwood changed the zoning to R-Suburban Residential. On February 21, 1973, the City of Northwood issued a special use permit to erect one hundred and ten (110) condominium units on a ten (10) acre section of the property. Although the full complement was never built, twenty-three (23) units and other improvements, including roadways, curbs, sewer and water, were constructed. Therefore, when Triomphe purchased the property, the ten (10) acre section of the property had twenty-three apartment units developed upon it; this was the section of property Triomphe sought to further develop as a condominium project.

The Northwood Codified Ordinances permit construction of condominiums only upon the issuance of a special use permit. Therefore, on September 26, 1988, Triomphe filed an application for the issuance of a special use permit. Triomphe applied for the special use permit to construct condominium units on the ten (10) acre section of the property which already contained the twenty three (23) apartment units.

On October 13, 1988, the City Council met and referred the matter to the Planning Commission. On November 14, 1988, the Planning Commission held a public hearing on Triomphe's application. A lengthy discussion ensued regarding the submitted plans. The City's Engineer, John Mekus, requested that Triomphe have an engineer provide plans to include additional information.

In addition, at the November 14, 1988, meeting, a number of

(Cont'd)
conditions of the sale was the division of the property into a ten (10) acre plot and a fifty (50) acre plot for the express purpose of further developing the ten (10) acre plot as a condominium project. *See* p. 2a, *infra*. On March 9, 1987, the parcel split was approved by the City Council.

residents asked questions about the project. One resident expressed concern over the condition of the ditches in the area and expressed her wish that they be cleaned up before any further development. Another resident asked about upgrading the existing apartments. Triomphe responded that the exteriors would be improved so as to enhance the proposed development.[2] The remaining questions concerned general information about the development such as recreational areas, time frame, and the number of proposed units. The permit was tabled until a later date so that Triomphe could prepare more detailed plans pursuant to the request of John Mekus, the City Engineer.

Triomphe complied with the Planning Commission's request for additional information. On March 13, 1989, John F. Mekus, City Engineer, and Dan Crane, Councilman, recommended approval of Triomphe's application conditioned upon the compliance with numerous technical requirements. Despite the conditions identified for approval, the Planning Commission nevertheless voted to recommend the denial of the special use permit to the City Council.

On May 11, 1989, despite Triomphe's compliance with the Planning Commission's conditions for approval, the City Council denied Plaintiff's application.

On May 12, 1989, only one day after Triomphe's first application for the issuance of a special use permit was denied, the City of Northwood's attorney wrote Triomphe's attorney and invited Triomphe to re-submit the revised application to the Planning Commission. *See* p. 3a, *infra*. Accordingly, Triomphe

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2. The existing apartment units were considered an "eyesore." Triomphe continually reaffirmed its intention to upgrade the existing units. Therefore, Triomphe's planned development would have increased the aesthetics of the area.

reapplied on May 31, 1989, and the City Council once again referred the matter to the Planning Commission for formal action.

On June 22, 1989, the City Council determined that the plans submitted by Triomphe did conform to the zoning requirements. In support of their cause, and to allay the City's and residents' major concern, Triomphe's attorney also sent a letter on June 29, 1989, which established that it would not be feasible to rent the condominiums rather than sell them.

On July 10, 1989, in spite of Triomphe's efforts and the fact that they complied with all of the Planning Commission's technical requirements, the Planning Commission once again decided not to recommend the special use permit. The matter was then referred to the Northwood City Council.

Triomphe was then instructed to provide City Council with condominium documents. These were provided. The special use permit was set for final determination on August 24, 1989. Triomphe's application was given three (3) readings and denied without discussion. The City denied the application because of unsubstantiated community sentiment that the project would lower property values. *See* p. 3a, *infra*.

Triomphe appealed the City's denial of the special use permit to the Court of Common Pleas of Wood County, Ohio. A Decision and Judgment was entered on October 29, 1990, by the Common Pleas Court finding the City of Northwood's actions to be arbitrary and ordering the issuance of the special use permit. *See* p. 4a, *infra*. The City of Northwood appealed the common pleas' decision, and the Court of Appeals affirmed the lower court with one caveat. The Court of Appeals ruled that the City could have some input into guiding the development of the project to insure conformance with city regulations. *See* p. 4a, *infra*.

Although Triomphe eventually received the special use permit, as a result of the delay occasioned by the City of Northwood's arbitrary actions, Triomphe, and the individual partners therein, suffered severe economic consequences. Triomphe's business partner, Jerred Construction, withdrew from the project because of the zoning difficulties. In addition, the property was foreclosed upon by the Bank and Triomphe was forced to sell the property, just two weeks prior to a Sheriff's sale, at a "fire sale" price to avoid the Sheriff's sale. Finally, Triomphe has a judgment against it held by the Chrysler Corporation because it was unable to meet the financing payments. Triomphe, and the individual partners therein, were literally destroyed financially as a result of the City's actions.

C. Lower Court Decisions

On November 2, 1993, the District Court, through Judge Lawrence P. Zatkoff, granted summary judgment against Triomphe's federal claims and dismissed the state claims without prejudice. *See* p. 41a, *infra*. The District Court ruled that Triomphe's just compensation claim was not ripe for review. In regards to the substantive due process claim, the District Court ruled that Triomphe did not have a legitimate entitlement to the special use permit because the City ultimately had the discretion to deny Triomphe's application for a special use permit. *See* p. 29a, *infra*. Assuming the existence of a protected interest, the District Court ruled that Triomphe did not suffer a constitutional violation because, in its view, a zoning authority may predicate a decision on unsubstantiated community sentiment. *See* p. 35a, *infra*. The District Court also determined that the city council members, sued in their individual capacity, were entitled to qualified immunity. *See* p. 34a, *infra*.

On November 23, 1993, Triomphe timely filed its Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. Triomphe appealed on three issues.

First, Triomphe contended that the District Court erred when it dismissed Triomphe's substantive due process claim arguing that it was unnecessary to implicate a state law property interest for a substantive due process claim, and that even if necessary, Triomphe possessed such an interest based upon the City's conduct and affirmative representations. Triomphe argued that it suffered a violation of its substantive due process rights in that the City predicated its decision to deny Triomphe's special use permit on unsubstantiated community sentiment.

Second, Triomphe contended that the City Council members were not entitled to qualified immunity.

Third, Triomphe contended, based upon the doctrine of collateral estoppel, that it was entitled to summary judgment on its claims.

On March 7, 1995, the Sixth Circuit affirmed the District Court's dismissal of Triomphe's Complaint. In principal part, the Sixth Circuit held:

> (1) In order to assert a substantive due process claim, Triomphe had to establish a liberty or property interest. *See* pp. 9a-10a, *infra*.
>
> (2) Despite the City's actions and affirmative representations, the language in Northwood City Ordinance § 1266.09 that a special use permit "may" be issued undercut any argument that a property or liberty interest arose through contract or implied contract principles. *See* pp. 11a-12a, *infra*.
>
> (3) A zoning authority could properly predicate a zoning decision on unsubstantiated community sentiment. *See* p. 8a, *infra*.

(4) Collateral estoppel did not apply because the federal constitutional standard for reviewing zoning decisions is much narrower than the state's review. *See* p. 8a, *infra*.

The Sixth Circuit did not consider whether the individual defendants were entitled to qualified immunity because Triomphe "failed to show a violation of a constitutionally-protected property interest." *See* p. 13a, *infra*.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD DEVELOP A UNIFORM STANDARD OF REVIEW FOR FEDERAL REVIEW OF LOCAL ZONING DECISIONS ON SUBSTANTIVE DUE PROCESS GROUNDS.

In *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992), the Sixth Circuit correctly recognized that "[a]lthough the Supreme Court has held that federal review of local zoning on arbitrary and capricious substantive due process grounds is valid in appropriate cases, it has never laid down definitive standards of review." *Id.* at 1217. A review of the Court's consideration of substantive due process zoning claims confirms this statement.

In *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Court reviewed a claim that a comprehensive zoning plan was unconstitutional under, in part, the due process clause. *Id.* at 384. The Court ruled:

> It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to

> particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and capricious.

Id. at 395.

In *Nectow v. City of Cambridge*, 277 U.S. 183 (1927), another case which concerned the federal review of a local zoning decision, the Court, citing *Euclid*, ruled:

> The governmental power to interfere by zoning regulations with the general right of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.

Id. at 188.

Finally, in *Village of Arlington Heights v. Metro Housing Development Corp.*, 429 U.S. 252 (1977), the Court ruled that the plaintiff, a nonprofit developer who contracted to develop low-income housing, had a substantive due process right to be free from arbitrary or irrational zoning actions. *Id.* at 263.

The circuit courts of appeals' individual interpretation of the foregoing authority have resulted in widely divergent standards of review. The Sixth Circuit opined that "[t]he lack of uniformity among the circuits in dealing with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable." *Pearson*, 961 F.2d at 1217.

The First Circuit, "it seems, shows a great reluctance to interject the federal courts into local zoning matters, holding that substantive due process is not violated by local zoning even when accompanied by claims of purposeful malicious obstruction of a landowner's rights." *Id.* (citing *Cloutier v. Town of Epping*, 714 F.2d 1184, 1189 (1st Cir. 1983)). Specifically, the First Circuit "considers a zoning ordinance as a legislative act that need only bear a '*conceivable* rational relationship' to 'legitimate governmental ends.' " *Pearson*, 961 F.2d at 1217 (citing *Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir. 1991), *cert. denied*, 502 U.S. 866 (1991), *reh'g denied*, 502 U.S. 1051 (1992); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 244 (1st Cir. 1990)). Recently, the First Circuit ruled that a substantive due process claim was not cognizable because the facts were not sufficiently "conscious-shocking." *Licari v. Ferruzzi*, 22 F.3d 344, 350 (1st Cir. 1994).

The Second Circuit applies a standard which is more hostile to federal zoning plaintiff's than the First Circuit's standard. *Pearson*, 961 F.2d at 1218. Specifically, while noting that "purely local zoning disputes are generally matters which are best left to municipal and state agencies to resolve," *Brady v. Town of Colchester*, 863 F.2d 205, 207 (2d Cir. 1988), the Second Circuit "would grant relief in extreme cases as where an applicant has a clear property right to a certificate of occupancy but the defendants refuse to issue it for political motives." *Sullivan v. Town of Salem*, 805 F.2d 81, 85 (2d Cir. 1986). However, even when the zoning authority was not vested with any discretion, there must still be a protected property right. *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918-19 (2d Cir. 1989), *cert. denied*, 493 U.S. 893 (1989).

The Third and Fourth Circuits will grant relief on the basis of substantive due process "where the zoning decision is irrational in the strict sense, or prompted by invidious political or

discriminatory motives." *Pearson*, 961 F.2d at 1218 (citing *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 683 (3rd Cir. 1991), *cert. denied*, 503 U.S. 984 (1992); *Bellow v. Walker*, 840 F.2d 1124, 1129 (3rd Cir. 1988), *cert. denied*, 488 U.S. 851 (1988), *cert. denied*, 488 U.S. 868 (1988); *Pace Resources, Inc. v. Shresbury Twshp.*, 808 F.2d 1023, 1035-36 (3rd Cir. 1987), *cert. denied*, 482 U.S. 906 (1987), *reh'g denied*, 483 U.S. 1040 (1987); *Marks v. City of Chesapeake*, 883 F.2d 308, 311 (4th Cir. 1989); *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983)).

The Fifth Circuit classifies all zoning actions as legislative, and therefore, such actions "can be set aside only under criteria that would justify invalidating a statute." *Pearson*, 961 F.2d at 1218 (citing *Shelton v. City of College Station*, 780 F.2d 475, 479 (5th Cir. 1986) (en banc), *cert. denied*, 477 U.S. 905 (1986), *cert. denied*, 479 U.S. 822 (1986); *Calhoun v. St. Bernard Parish*, 937 F.2d 172, 174 (5th Cir. 1991), *cert. denied*, 502 U.S. 1060 (1992); *Horizon Concepts Inv. v. City of Balch Springs*, 789 F.2d 1165, 1167 (5th Cir. 1986)).

The Sixth Circuit recognizes the legislative/administrative distinction. *Pearson*, 961 F.2d at 1221. Where a substantive due process attack is made on a state administrative action, *i.e.*, a relatively small number of persons are affected on individual grounds, "the scope of review by the federal courts is extremely narrow." *Id.* Specifically, "a plaintiff must show that the state administrative agency has been guilty of 'arbitrary and capricious action' in the strict sense, meaning 'that there is no rational basis for the . . . [administrative] decision.' " *Id.* (citing *Stevens v. Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981)). Under the Sixth Circuit's standard, "[t]he administrative action will withstand substantive due process attack unless it 'is not supportable on any rational basis' or is 'willful and unreasoning action, without consideration and in disregard of the facts or

circumstances of the case.' " *Pearson*, 961 F.2d at 1221 (citing *Greenhill v. Bailey*, 519 F.2d 5, 10 n.12 (8th Cir. 1975)).

The Seventh Circuit strongly disapproves of federal courts reviewing local zoning matters. *Pearson*, F.2d at 1219. The Seventh Circuit, contrary to the Sixth Circuit, holds that "any action by the local legislative body on a zoning matter – even one concerning only a site plan for a single piece of property – is legislative." *Id.* (citing *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988)). Therefore, the action can only be set aside if "invidious or irrational." *Id.*

According to the Sixth Circuit, "[t]he Eighth Circuit judges are in disagreement among themselves as to the correct approach to federal review of local zoning, and a concurring opinion in an *en banc* case opines that the succinct majority opinion overruled the leading Eighth Circuit case by stating: 'whether a substantive due process claim may arise from a denial of a zoning permit is an open question in this circuit.' " *Pearson*, 961 F.2d at 1219 (citing *Lemke v. Cass County*, 846 F.2d 469, 470 (8th Cir. 1987) (en banc)). In *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990), however, the Eighth Circuit ruled that challenged action must be so "egregious" or "irrational" that the challenged action exceeds standards of inadvertence and mere error of law.

The Ninth Circuit "will subject local zoning decisions to substantive due process review, but the scope of review is that for legislation, even as to an individual property owner's claim, and any relationship to a proper zoning goal, such as prevention of a traffic congestion, will be sufficient." *Pearson*, 961 F.2d at 1219 (citing *Southern Pac Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991)); *see also*, *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 193 (1994).

The Tenth Circuit "imposes a strict property right test similar to the Second Circuit. If that test is met, it will consider whether the zoning was arbitrary and capricious." *Pearson*, 961 F.2d at 1219 (citing *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111 (10th Cir. 1991)).

The Eleventh Circuit's approach requires the zoning authority to demonstrate that the challenged action bears a substantial relationship to general welfare interests. *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990); *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1373-75 (11th Cir. 1993).

Finally, the District of Columbia Circuit applies "a very deferential standard of review under substantive due process." *Pearson*, 961 F.2d at 1219. Specifically, "[o]nly a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983." *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988), *reh'g denied en banc*, 851 F.2d 434 (1988), *cert. denied*, 488 U.S. 956 (1988).

In sum, the circuit courts of appeals disagree over whether zoning actions should be classified into legislative or administrative action, over whether it is necessary to demonstrate a property right as a prerequisite to a substantive due process zoning claim, and foremost, have adopted widely divergent standards of review for substantive due process zoning claims.

In *Nectow v. City of Cambridge* (1928), *supra*, the Court ruled that zoning restrictions would run afoul of the due process clause if they did "not bear a substantial relation to the public health, safety, morals, or general welfare." 277 U.S. at 188. Since that ruling, the Court has not enunciated a definitive standard of review. It is apparent that this Court must identify a

uniform standard of review that can be applied consistently among the circuits.

II.

THE COURT MUST CLARIFY THAT IT IS NOT NECESSARY TO IMPLICATE A LIBERTY OR PROPERTY INTEREST AS A PREREQUISITE TO A SUBSTANTIVE DUE PROCESS CLAIM.

In the case below, the Sixth Circuit reaffirmed its commitment to its early ruling in *Silver v. Franklin Twshp. Bd. of Zoning Appeals*, 966 F.2d 1031 (1992), that before Triomphe could assert a substantive due process claim, it had to establish "a legitimate claim of entitlement" or a "justifiable expectation" to the granting of the special use permit. *See* pp. 9a-10a, *infra*. Thus, the Sixth Circuit has mistakenly required Triomphe to demonstrate a property or liberty interest as a prerequisite to its substantive due process claim.

As stated by the Sixth Circuit Court of Appeals in *Pearson v. City of Grand Blanc, supra*, "[w]hile there are undoubtedly theoretical difficulties with the concept of substantive due process, the existence of such a right is too well established to be gainsaid." 961 F.2d at 1220. The contours of this right, however, have not been definitively identified by the Court. *Id.* at 1217.

"Substantive due process" has been defined as: "The doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed . . . ." Comment, *Developments in the Law – The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1166 (1980). Another treatise has heralded substantive due process as "the indispensable residual safeguard of constitutional protection available to combat a broad range of abusive

governmental conduct." J. Michael McGuinness & Lisa A. McGuiness Parlagreco, *The Reemergence of Substantive Due Process as a Constitutional Tort: Theory, Proof, and Damages*, 24 New Eng. L. Rev. 1129, 1131 (1990).

Substantive due process "stem[s] from our American ideals of fundamental fairness . . . [which] enmesh[es] the judiciary in substantive review of governmental action." *Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1988). Indeed, substantive due process has been extended to the right to medical treatment, *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239 (1983), the right to personal security, *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982), and even the retailer's right to sell smoking accessories and a purchaser's right to buy and use them. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 497 n. 9 (1982).

Substantive due process guarantees have also been extended to local zoning decisions. In *Village of Arlington Heights v. Metro Housing Development Corp., supra*, the Court ruled that the plaintiff, a nonprofit developer who contracted to develop low-income housing, had a substantive due process right to be free from arbitrary or irrational zoning actions. 429 U.S. at 263.

Arlington Heights is instructive because it undercuts the Sixth Circuit's requirement that Triomphe must establish a property or liberty interest as a prerequisite to a substantive due process claim. In *Arlington Heights*, as in the instant case, the plaintiff contracted to purchase a tract of land for the development. However, the purchase was contingent upon the plaintiff securing zoning clearances from the defendant-village. *Id.* at 256.[3] The defendant-village argued that the plaintiff did not

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3. *Arlington Heights* is also similar to the instant case in that the plaintiff also complied with every change recommended by the defendant-village during consultation by modifying the development plans. 429 U.S. at 257.

have standing because it did not suffer any economic injury. *Id.* at 262. Specifically, "[i]ts contract of purchase [was] contingent upon securing rezoning. [The plaintiff] owe[d] nothing if rezoning [was] denied." *Id.* The Court rejected this argument, however, noting that the substantive due process right to be free from arbitrary or irrational zoning decisions existed independently of a property or liberty interest. *Id.* at 263.

Other decisions support Triomphe's contention that it is not necessary to demonstrate a property or liberty interest as a prerequisite to a substantive due process claim. In *Village of Euclid, Ohio v. Ambler Realty Co., supra*, one of the earlier decisions concerning a federal court's review of a local zoning decision, the Court reviewed a claim that a comprehensive zoning plan was unconstitutional under, in part, the due process clause. 272 U.S. at 384. The Court noted that the zoning plan "must find [its] justification in some aspect of the policy power, asserted for the public welfare." *Id.* at 387.[4] The Court sustained the zoning plan because the appellant did not demonstrate that the plan had an appreciable affect on his property. *Id.* at 397. However, the Court ruled:

> It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and capricious.

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4. In *Berman v. Parker,* 318 U.S. 26 (1954), another zoning case, the Court reiterated that the authority of a zoning plan is predicated in the police power. *Id.* at 32.

Id. at 395. Notably, this ruling was not predicated upon a state law property or liberty interest.

In *Nectow v. City of Cambridge, supra*, another case which concerned the federal review of a local zoning decision, the Court, citing *Euclid,* ruled:

> The governmental power to interfere by zoning regulations with the general right of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.

277 U.S. at 188. As in *Euclid,* this ruling was not predicated upon a state law property or liberty interest.

Scholarly analysis supports Triomphe's contention that it is not necessary to implicate a liberty or property interest as a prerequisite to a substantive due process claim. For instance, in one article, the authors opine:

> Lower courts have often confused various due process claims by failing to sufficiently delineate the critical distinctions between procedural and substantive due process. Procedural due process generally consists of notice and an opportunity for a hearing before deprivation of a property or liberty interest. Substantive due process rights are not dependent upon property rights under state law as in the case of procedural due process rights. Rather, substantive due process

> affords plaintiffs a broad residual theory to challenge the root of governmental conduct and punitive damages along with equitable relief where appropriate. In other words, "[s]ubstantive due process rights are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution."

McGuinness & McGuinness Parlagreco, *supra*, at p. 1133 (citing *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986)).[5]

In addition, precedent does not support the Sixth Circuit's ruling. In fact, a review of the Sixth Circuit's decisions belies the propriety of its rule. In *Pearson v. City of Grand Blanc*, the seminal Sixth Circuit case for zoning substantive due process claims, the court only notes that citizens have a right to be free from arbitrary or irrational decisions. 961 F.2d at 1217. However, in *Silver*, without providing any analysis of substantive due

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5. In *Toney-El v. Franzen*, 777 F.2d 1224 (7th Cir. 1985), *cert. denied*, 476 U.S. 1178 (1986), the Seventh Circuit Court of Appeals explained that "substantive due process is a shorthand for the fact that the Supreme Court has interpreted the due process clause of the Fourteenth Amendment to confer certain substantive rights based mainly on the Bill of Rights." *Id.* at 1227. Furthermore, "[t]hose substantive rights include the specific guarantees in the Bill of Rights as well as 'penumbras, formed by emanations from those guarantees that help give them life and substance.' " *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)).

Another scholar has noted that an approach which requires an identification of a property or liberty interest as a prerequisite to a substantive due process claim, does not have any basis in this Court's substantive due process decisions. Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. Dayton L. Rev. 313, 348 (1991).

process, the Sixth Circuit ruled that a property interest was necessary. 966 F.2d at 1036.

The Sixth Circuit has mistakenly required the demonstration of a property or liberty interest as a prerequisite to a substantive due process claim. This requirement is not well founded in the origins of substantive due process, nor its evolution in modern-day jurisprudence.

III.

THE COURT MUST CLARIFY THAT, DESPITE A DISCRETIONARY ZONING ORDINANCE, A PROPERTY OR LIBERTY INTEREST MAY ARISE FROM CONTRACT OR IMPLIED CONTRACT PRINCIPLES.

In *Silver v. Franklin Twshp. Bd. of Zoning Appeals, supra*, a case in which the plaintiff alleged that the city arbitrarily and capriciously denied him a variance to construct a condominium complex, the Sixth Circuit Court of Appeals ruled that in order for the plaintiff to establish a constitutionally protected property or liberty interest, he "must prove that the Franklin Township Board of Zoning Appeals did not have the discretion to deny Silver's use of the land as a condominium complex if he complied with certain minimum, mandatory requirements." 966 F.2d at 1036. Moreover, "[i]f the Board had the discretion to deny Silver a conditional zoning certificate for a condominium complex even if he complied with certain minimum, mandatory requirements, then Silver would not have a 'legitimate claim of entitlement' or a 'justifiable expectation' in the approval of his plan." *Id.*

Therefore, even though the zoning authority required the plaintiff to satisfy numerous conditions before they would approve his application for a zoning variance, and even though the zoning authority advised and encouraged him through the

application process, because the zoning ordinance contained discretionary language, *i.e.*, a variance may be issued if found *desirable*, a protected property or liberty interest could never develop.

In the case below, Triomphe argued that a protected property or liberty interest could arise from contract or implied contract principles. Triomphe argued that if the Sixth Circuit were to only consider the language of the zoning ordinance, completely ignoring the City's conduct and representations, it would essentially grant the City *carte blanche* to engage in the most egregious action with impunity so long as it "immunized" itself by passing an ordinance with discretionary language, *i.e.*, "a special use permit *may* be issued."

This argument was rejected by the Sixth Circuit Court of Appeals. The Sixth Circuit reaffirmed its commitment to the ruling in *Silver,* holding, in pertinent part, that a property or liberty interest could not be based upon contract or implied contract principles because the discretionary language of the zoning ordinance foreclosed such an argument. *See* pp. 11a-12a, *infra*. Therefore, even though the City split the sixty (60) acre plot into ten (10) and fifty (50) acre plots so that the ten (10) acre plot could be developed as a condominium complex, required Triomphe to satisfy numerous technical requirements, and invited Triomphe to re-apply after their first application was denied; and even though the pre-existing use of the subject property was a multi-family development, which foreclosed the use of the land for other purposes, Triomphe did not possess a protected property or liberty interest.

This ruling is myopic and fails to consider well-established legal principles.

In *Leis v. Flynt,* 439 U.S. 438 (1979), the Court ruled that a

claim of entitlement under state law, to be enforceable, must be derived from statute or legal rule or through a *mutually explicit understanding*. *Id.* at 442. (Emphasis added). A property or liberty interest may also be based in implied contract principles. *Perry v. Sinderman*, 408 U.S. 593, 601-603 (1972).

Other federal courts have recognized the foregoing principles. *See, e.g., Nasierowski Bros. Inv. v. City of Sterling Heights*, 949 F.2d 890, 897 (6th Cir. 1991) ("The acquisition of the land was, in and of itself, a *substantial* act undertaken exclusively upon the City's approval and affirmative encouragement of the proposal."); *McCanley v. City of Jacksonville*, 739 F. Supp. 278, 283 (E.D.N.C. 1989), *aff'd*, 904 F.2d 720 (4th Cir. 1990) (issuance of building permit creates a vested right to build where permittee has made substantial expenditure in reliance of permit); *Mays-Ott Co., Inc. v. Town of Nags Head*, 751 F. Supp. 82, 85 (E.D.N.C. 1990) (plaintiff's substantial expenditures in constructing two or three planned duplexes and amenities are sufficient to create a vested property right); *Lanmar Corp. v. Rendine*, 811 F. Supp. 47, 51 (D.R.I. 1993) (property owner had property interest in building permit after spending eight months razing the existing structures on the property).

Under the Sixth Circuit's current view, if the zoning ordinance contains discretionary language, a property or liberty interest may never develop regardless of the extent of reliance or the affirmative conduct and representations of the zoning authority. This runs afoul of well-established legal principles, and essentially immunizes the zoning authority from liability.

The Court must clarify that property or liberty interests may develop from contract or implied contract principles even though the zoning ordinance contains discretionary language.

IV.

THE SIXTH CIRCUIT INCORRECTLY HELD THAT A LOCAL GOVERNING AUTHORITY MAY PREDICATE A ZONING DECISION ON COMMUNITY SENTIMENT WHICH HAS NO BASIS IN FACT.

In the case below, Triomphe argued that the City's denial of its special use permit, which was predicated upon unfounded community sentiment, violated its substantive due process rights. Even though the Sixth Circuit did not directly rule on this issue, it noted:

> Triomphe, relying on *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985), argues that a zoning decision is arbitrary and capricious if the government bases it on community viewpoints which are unfounded. *Cleburne*, however, is inapposite since it involved an equal protection challenge on behalf of the mentally retarded. The *Cleburne* court itself noted that negative attitudes or unsubstantiated fears "are properly cognizable in a zoning proceeding." *Id.* at 448.

See pp. 7a-8a, *infra*.

Triomphe concedes that *Cleburne* is an equal protection case, but submits that the Sixth Circuit has noted a distinction which does not make a difference. In *Cleburne*, the Court applied a rational basis test, the most deferential standard of review, which "allows the States wide latitude." 473 U.S. at 432, syllabus no. 1(a). With that in mind, the Court ruled that unfounded community sentiment was not a permissible basis for treating a

home for the mentally retarded differently from apartment houses and multiple dwellings. 473 U.S. at 432, syllabus no. 2.

While the standard of review for substantive due process zoning claims has not been definitively established by this Court, it is akin to a "rational basis" test. *See, e.g., Midnight Sessions, Ltd. v. City of Philadelphia,* 945 F.2d 667, 682 (3rd Cir. 1991). Accordingly, other federal courts have ruled that a zoning decision predicated upon unsubstantiated community sentiment is arbitrary and capricious, and therefore, a violation of the substantive due process clause. *Id.* at 685; *Browning-Ferris Indus. v. City of Maryland Heights,* 747 F. Supp. 1340, 1349 (E.D. Mo. 1990) (city's denial of landfill license was arbitrary and capricious because it relied on clamorous public sentiment, that was contrary to substantial weight of the evidence); *accord, McCollum v. City of Powder Springs,* 720 F. Supp. 985, 989-90 (N.D. Ga. 1989) (granting or denying applications based on public opposition, when public opposition is not listed as an established criteria in promulgated guidelines, is an unconstitutional due process and equal protection violation).

Consistent with the ruling in *Cleburne,* in light of the Sixth Circuit's ruling, the Court must reiterate that a zoning decision may not be based on community sentiment which has no basis in fact.

V.

THE SIXTH CIRCUIT ERRED BY RULING THAT COLLATERAL ESTOPPEL DID NOT APPLY TO THE INSTANT CASE.

In the state court proceedings, prior to the filing of the instant lawsuit, the state courts determined that the City acted "without consideration and in disregard of the facts or circumstances of the

case" by predicating their decision to deny the permit upon unsubstantiated community sentiment. Specifically, the state court of appeals ruled that "[t]here was no evidence that the development would in any way affect neighboring property values or the health, safety, or welfare of the community."

Triomphe argued that the foregoing ruling necessarily determined *facts* which established a substantive due process violation under federal law as a matter of law, *i.e.*, that the decision was "willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case." *Pearson*, 961 F.2d at 1221.

In the case below, the Sixth Circuit ruled, while noting that "the constitutional standard in reviewing zoning decisions is much narrower than the state's review," that collateral estoppel did not apply. Notably, the Sixth Circuit did not cite to any authority when it rendered this decision.

It is a well settled principle of federal law that a federal court must accord a state proceeding the same preclusive effect the state proceeding would have under state law. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 80-85 (1984); *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 587 (11th Cir. 1990).

Under Ohio law, the second concept of *res judicata*, "collateral estoppel" "precludes the relitigation, in a second action, *of an issue* actually and necessarily litigated and determined in a prior action where all the parties in the first action are present in the second action." *Shoemaeker v. First Nat'l Bank of Ottawa*, 421 N.E. 2d 530, 538, 66 Ohio St. 2d 304 (1981) (Emphasis in original). Furthermore, "[a]lthough the cause of action differs, the prior judgment precludes relitigating the same issue in the second suit." *Id.*

Triomphe never argued that the state courts determined that the City's actions satisfied the standard of review of its substantive due process zoning claim. Rather, Triomphe's argument was that a *specific issue* had been determined which entitled it to summary judgment. The Sixth Circuit did not actually consider this argument, but blithely ruled that collateral estoppel did not apply. Accordingly, the Court should direct the lower court to apply the principle of collateral estoppel to the facts of the instant case.

CONCLUSION

There are several compelling reasons why this Court should grant Triomphe's Petition for Writ of Certiorari. First and foremost, although the Court has ruled that a substantive due process rights extend to zoning decisions, the contours of this right have not been definitively established. Accordingly, it is imperative that the Court enunciate a *uniform* standard of review for federal review of a local zoning decision under the substantive due process clause.

Second, the Sixth Circuit has incorrectly ruled that a protected property or liberty interest must be established as a prerequisite to a substantive due process claim.

Third, in light of the Sixth Circuit's ruling, the Court must reiterate that a zoning decision may not be predicated on community sentiment which has no basis in fact.

Finally, in the case below, the Sixth Circuit has rendered a decision which places local zoning authorities beyond reproach of the due process clause so long as they adopt zoning ordinances which contain discretionary language. This is clearly not the law in that it unduly restricts the application of the due process clause,"the indispensable residual safeguard of constitutional

protection available to combat a broad range of abusive governmental conduct."

Respectfully submitted,

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APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MARCH 7, 1995

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-4272

TRIOMPHE INVESTORS; JAMES D. HAYNES; STEVEN J. LINSENMEYER; and JAN LINSENMEYER,

Plaintiffs-Appellants.

v.

CITY OF NORTHWOOD; JAMES CRANE; PATRICIA BELKNAP; JOHN MELNYK; RAYMOND LARK; and JOHN E. BLAIR,

Defendants-Appellees.

ON APPEAL from the United States District Court
for the Northern District of Ohio

Decided and Filed March 7, 1995

Before: BROWN, KENNEDY, and SILER, Circuit Judges.

KENNEDY, Circuit Judge. Triomphe Investors, an Ohio general partnership, and its individual partners (collectively "Triomphe"), appeal the District Court's grant of summary judgment on its substantive due process claim. The City of Northwood, Ohio ("City") denied Triomphe a special use permit to build condominium units. Triomphe followed the state

procedure for appealing this decision and was successful in obtaining the permit. By this time, however, Triomphe was in financial trouble and could no longer construct the units. Triomphe brought this action against the City and individual members of its city council (collectively "defendants"), seeking damages for the failure to issue the permit when requested. Triomphe advanced four theories of recovery. The District Court either dismissed or granted summary judgment in favor of defendants on all of Triomphe's claims. Triomphe now appeals only the substantive due process claim and the finding of qualified immunity of the individual defendants on that claim.

I.

In 1972 the City changed the zoning of the sixty-acre piece of real estate involved in the present case from "A-Agricultural and Rural Residential" to "R-Suburban Residential." In 1973, the City issued a special use permit to a prior owner, allowing 200 condominium units to be constructed on ten acres of the sixty-acre parcel of land at issue. Only twenty-three units were built and maintenance problems developed with those units in subsequent years. In March 1987, Triomphe purchased the parcel from the Chrysler Corporation. The sale was conditioned on officially dividing the parcel into a ten-acre plot and a fifty-acre plot. The City divided the plot at Triomphe's request. The purchase agreement between Chrysler and Triomphe states that Triomphe intended to build condominium units on the ten-acre plot, but this was not a condition of the sale. In order to build these condominium units, Triomphe needed to obtain a special use permit from the City.

On September 26, 1988, Triomphe filed an application with the City of Northwood Planning Commission ("Planning

Commission") for the issuance of a special use permit to build fifty additional condominium units on the ten acre parcel. The Planning Commission and Triomphe entered into a series of discussions which resulted in Triomphe modifying its construction plans. Even so, the Planning Commission recommended to the City Council that the application for a special use permit be denied.

On May 11, 1989, the City Council voted to deny Triomphe's application because (1) there were problems with water and with the poor maintenance of the existing constructed condominiums; (2) the value of the units was too low for the neighborhood; (3) there was concern that if the units did not sell, the units would become rental properties; and (4) there was no recreational area. On May 12, 1989, the City Attorney wrote a letter inviting Triomphe to reapply for a special use permit after it had addressed the concerns of the City Council.

On May 31, 1989, Triomphe reapplied for a special use permit with plans that conformed to all of the zoning requirements. Triomphe also wrote to the City to inform the City that it would not be economically feasible to rent the condominium units if they did not sell. On July 10, 1989, the Planning Commission again recommended that Triomphe's application for the permit be denied.

At the August 24, 1989, City Council meeting, residents of the neighborhoods surrounding the proposed condominium site expressed concern that the lower priced condominium units would adversely affect the value of their property. The District Court found that the City Council still was troubled by the lack of maintenance and care in the existing units. The City Council, without providing reasons, denied Triomphe's second application for the permit.

Triomphe appealed this denial to the Court of Common Pleas of Wood County, Ohio. Finding that all the zoning requirements set forth in the City Code were satisfied by Triomphe, the Court of Common Pleas ordered that the special use permit be issued to Triomphe. The City appealed. The Court of Appeals affirmed, holding that the City's unsubstantiated concerns about property value did not constitute substantial evidence that the proposed use was detrimental to the community. *Triomphe Investors v. City of Northwood,* No. 90WD095, 1992 WL 48527 (Ohio App. March 13, 1992). The Court of Appeals remanded the matter to the City Council so that the City Council could determine whether restrictions should be placed on the special use permit.

By the time the City Council issued the special use permit to Triomphe, Triomphe was not in a financial position to build the condominium units and it had to sell the property. Triomphe filed the present action against the City, the elected members of City Council, and the chairman of the Planning Commission. Triomphe advanced four theories of recovery: a just compensation takings claim, procedural and substantive due process claims,[1] and a tortious interference with contract claim under Ohio law.

Both Triomphe and defendants moved for summary judgment. The District Court denied Triomphe's motion. The court granted summary judgment for the individual defendants on the substantive due process claim based on qualified immunity. The court granted summary judgment for the City and the individuals in their official capacities, finding that Triomphe had failed to state a section 1983 claim. The court dismissed both the Fifth Amendment takings claim and the state law claim.

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1. In light of the relief obtained by Triomphe in state court, Triomphe voluntarily dismissed the procedural due process claim.

Triomphe Investors v. City of Northwood, 835 F. Supp. 1036, 1048 (N.D. Ohio 1993). Triomphe appeals only the District Court's grant of summary judgment for defendants with respect to the substantive due process claim.[2]

II.

We review a district court's grant of summary judgment de novo. *Hanover Ins. Co. v. American Eng'g Co.,* 33 F.3d 727, 730 (6th Cir. 1994). The material facts relevant to this appeal are not in dispute, so summary judgment was appropriate if plaintiff failed to make a showing sufficient to establish any element essential to its claims and on which it bore the burden of proof. *Barnhart v. Pickrel, Schaeffer & Ebeling Co.,* 12 F.3d 1382, 1388-89 (6th Cir. 1993).

III.

The District Court held that because language in the City's zoning regulation gave the City Council discretion to issue special use permits, Triomphe did not possess a legitimate claim

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2. Although neither the parties nor the District Court addressed this issue, Triomphe's substantive due process claim appears to be no different from an ordinary takings claim brought under the Fifth and Fourteenth Amendments. Triomphe seeks damages for the loss of use of its property because of the time it took to litigate in state court. Ordinarily, a party must seek compensation through the procedures established by the state and cannot bring a federal constitutional takings claim until he or she has been denied compensation through these procedures. *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 194 (1985); *Silver v. Franklin Township Board of Zoning Appeals,* 966 F.2d 1031, 1034 (6th Cir. 1992). Ohio law does provide an inverse condemnation procedure and Triomphe has failed to use it. *Triomphe,* 835 F. Supp. at 1047. However, under current law of this circuit, the substantive due process claim appears to be ripe. *Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1212 (6th Cir. 1992).

of entitlement to a special use permit. *Triomphe,* 835 F. Supp. at 1043. The court concluded that because Triomphe had no legitimate claim of entitlement it did not have a property interest which could support its substantive due process claim for the special use permit. *Id.* at 1044.

Triomphe argues first that it is unnecessary to demonstrate a state law property right to the special use permit in order to establish a substantive due process claim. Alternatively, if it is necessary to demonstrate a state law property right, Triomphe argues it had a legitimate claim of entitlement. Finally, Triomphe asserts that it has established a substantive due process claim because it had a justifiable expectation that the special use permit would be granted.

Triomphe, relying upon *Pearson v. City of Grand Blanc,* 961 F.2d 1211 (6th Cir. 1992), argues that the only property interest requirement is ownership of the property. *Pearson,* however, does not deal with a request for a special use permit. The plaintiff in *Pearson* sought to have a portion of his property rezoned from residential to commercial so that a McDonald's could be placed on the site. The standard of review of such a denial, whether the denial was a legislative or administrative action, was discussed at length. The court applied the administrative standard of review, the standard most favorable to plaintiff, and found that his substantive due process rights were not violated.

The *Pearson* court held that substantive due process in the zoning context requires that "[t]o prevail, a plaintiff must show that the state administrative agency has been guilty of 'arbitrary and capricious action' in the *strict* sense, meaning 'that there is no rational basis for the . . . [administrative] decision.' " *Id.* at 1221 (citation omitted).

As the *Pearson* court pointed out,

> [t]he use of the term "arbitrary and capricious" in this context causes considerable confusion, because these same terms are also used to describe the scope of review by state courts of state administrative action. Therefore, it must be emphasized that the state court scope of review of a decision of a state administrative agency is far broader than the federal scope of review under substantive due process.

Id.

Triomphe argues that the state court's finding that the denial of the permit was not supported by a preponderance of substantial evidence and was therefore arbitrary and capricious meets the *Pearson* standard. However, as noted by the *Pearson* court, the state court's inquiry is not the required inquiry for a constitutional violation. We cannot say that the City Council acted irrationally in denying the permit. At the City Council meeting on August 24, 1989, persons living in the neighborhoods surrounding the proposed condominium project expressed concern that the lower priced condominiums would adversely affect their property values. In light of the substantial problems with the earlier condominium project there was a reasonable basis for denying the permit.

Triomphe, relying on *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985), argues that a zoning decision is arbitrary and capricious if the government bases it on community viewpoints which are unfounded. *Cleburne,*

however, is inapposite since it involved an equal protection challenge on behalf of the mentally retarded. The *Cleburne* court itself noted that negative attitudes or unsubstantiated fears "are properly cognizable in a zoning proceeding." *Id.* at 448.

Triomphe also argues that it was entitled to prevail based on the doctrine of collateral estoppel. The reasonableness of the City Council's decision, Triomphe argues, was determined by the state courts and the federal courts are bound by this finding. We agree with the District Court that because the constitutional standard in reviewing zoning decisions is much narrower than the state's review, the question addressed by the two courts is not the same. Thus, collateral estoppel does not apply.

Triomphe next contends that even if it is required to establish a state law property interest in developing the ten-acre parcel, it has met this requirement. In order to have such a property interest supporting a substantive due process claim, Triomphe must show either that it possessed a legitimate claim of entitlement to the special use permit or a justifiable expectation that the City Council would issue the permit. *Silver v. Franklin Township Board of Zoning Appeals,* 966 F.2d at 1036.

In *Silver,* under facts analogous to those here, we held that "[t]o establish a violation of substantive due process, a plaintiff must first establish the existence of a constitutionally-protected property or liberty interest." *Id.* at 1036. In *Silver,* plaintiff purchased a parcel of land in an area zoned for single-family residential use on which the plaintiff wanted to build condominiums. The board of zoning appeals granted him a conditional zoning certificate with seven conditions to be met. The Board later rescinded the conditional approval, stating that the plaintiff had not met all of the required conditions.

Appendix A

We held that the plaintiff had not established a violation of substantive due process because the board had discretion to grant him his permit:

> [B]efore [plaintiff] can establish a violation of substantive due process he must demonstrate that he had a property interest in the use of the undeveloped parcel as a condominium complex. To do this, [plaintiff] must prove that the [board of zoning appeals] did not have the discretion to deny [plaintiff's] use of the land as a condominium complex if he complied with certain minimum, mandatory requirements. If the [b]oard had the discretion to deny [plaintiff] a conditional zoning certificate for a condominium complex even if he complied with certain minimum, mandatory requirements, then [plaintiff] would not have a "legitimate claim of entitlement" or a "justifiable expectation" in the approval of his plan.

Silver, 966 F.2d at 1036 (citations omitted). We had required such a property interest in the earlier case of *G.M. Engineers & Associates, Inc. v. West Bloomfield Township,* 922 F.2d 328, 331 (6th Cir. 1990).

We find *Silver* to be controlling. In *Silver,* we held that if the board of zoning appeals has discretion to deny the plaintiff a conditional zoning certificate, even if he complied with the "minimum, mandatory requirements," the plaintiff would have had neither a " 'legitimate claim of entitlement' [n]or a

'justifiable expectation' in the approval of his plan." *Silver*, 966 F.2d at 1036 (citations omitted).

Here, the City Council had final discretion to grant or deny Triomphe a special use permit.[3] Section 1266.09 of the Northwood City Code provides that "[a] special use permit *may* be granted in any of the established zoning districts." (Emphasis added.) We agree with the District Court that "[t]he use of the

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3. Section 1266.13 of the Northwood City Code sets out criteria which must be considered by the Planning Commission and City Council in their decisions concerning a special use permit:

1266.13 CRITERIA FOR CONSIDERATION

The following criteria shall be used by the Planning Commission and Council in considering a special use application:

(a) The special use is necessary or desirable for the public convenience at that location.

(b) The special use is so designed, located and proposed to be operated that the public health, safety and welfare will be protected.

(c) The special use will not cause substantial injury to the value of other property in the neighborhood in which it is to be located.

(d) The special use conforms to the applicable regulations of the district in which it is to be located, including yard and height restrictions, and also conforms to the requirements for off-street parking as set forth in Section 1266.05.

word 'may' provides sufficient discretion to undercut any argument that the language of the zoning regulations vested in [Triomphe] an entitlement to the special use permit once the four factors in § 1266.13 were fulfilled." *Triomphe,* 835 F. Supp. at 1043.

Just as *Silver* forecloses Triomphe's claim based on a legitimate claim of entitlement, it also forecloses Triomphe's claim based on justifiable expectations. *Silver,* 966 F.2d at 1036. Triomphe had no justifiable expectation that its plan would be approved because the board had discretion to deny a special use permit despite Triomphe's compliance with the minimum requirements.

Triomphe advances two reasons that it expected a special use permit would be granted. First, a permit had been issued before on the same property for more units than were actually constructed. Second, Triomphe contends that it had an implied contract with the City that a permit would be issued once Triomphe modified the plans.

We find that Triomphe was not justified in assuming that a permit would be issued again. The previous permit was issued fifteen years before Triomphe applied for its permit. It did not authorize Triomphe to build the requested condominiums. A new permit was required.

Nasierowski Brothers Investment Co. v. City of Sterling Heights, 949 F.2d 890 (6th Cir. 1991), is not to the contrary. In *Nasierowski,* the landowner purchased his property in a transaction expressly contingent upon the landowner's securing of a favorable zoning opinion from the city. The city assured him that his property was zoned for the general business purposes he

proposed, but later changed the zoning without the required public notice. We found that the landowner had a property interest allowing him to raise a procedural due process challenge to the rezoning.

Here, the City did not change the zoning. Although the City knew that Triomphe intended to build condominium units on the property, this is insufficient to create a state law property interest in the special use permit.

Triomphe also argues that it had an implied contract with the City because the City conditioned the approval of the permit upon Triomphe's compliance with numerous technical requirements, requiring Triomphe to bear the expense of revising the site plans. Triomphe notes that the City invited it to reapply after its first application was denied.

There could be no implied contract here because the City had discretion to deny the permit. In *Silver,* the board of zoning appeals required the developer to address seven concerns before it would reconsider his request for a conditional zoning certificate. *Silver,* 966 F.2d at 1033. However, the planning commission could deny the developer's request even if he complied with the requirements. *Id.* at 1036. Here, likewise, the City ordinances made no promises of approval to Triomphe even if the requirements were met. Plaintiff has failed to demonstrate a state property law right which entitles it to a special use permit under any of the theories it has advanced.

IV.

We agree with the District Court that Triomphe has failed to show a violation of a constitutionally-protected property interest.

Because Triomphe has not stated a cognizable constitutional claim, we need not decide whether defendants are entitled to qualified immunity. *Black v. Parke*, 4 F.3d 442, 445 (6th Cir. 1993).

The District Court's decision granting summary judgment to defendants is **AFFIRMED.**

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED OCTOBER 29, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NO. 3:90-CV-7431
HON. LAWRENCE P. ZATKOFF

TRIOMPHE INVESTORS, an Ohio General Partnership, JAMES D. HAYNES, individually and as a General Partner, STEVEN J. LINSENMEYER, individually and as a General Partner, and JAN LINSENMEYER, individually and as a General Partner,

Plaintiffs,

vs.

CITY OF NORTHWOOD, JAMES CRANE, PATRICIA BELKNAP, JOHN MELNYK, RAYMOND LARK, and JOHN E. BLAIR,

Defendants.

OPINION AND ORDER

I. INTRODUCTION

This matter arises out of defendants'[1] denial of a special use

1. The individual defendants were elected members of the City of Northwood's City Council. These defendants have been sued both in their individual and official capacities. However, when such defendants are sued in their (Cont'd)

permit which would have permitted plaintiffs to build condominiums on a certain ten acre parcel of land. Currently before this Court are defendants' motion for summary judgment and plaintiffs' motion for summary judgment. Each side has submitted their respective response and reply briefs, along with voluminous exhibits. Pursuant to the Local Rules of this District, this Court will dispense with oral argument on these motions. L.R. 8:8.1(g). For the reasons set forth below, the individual defendants' motion for summary judgment on plaintiffs' federal claims (count I) shall be granted and the defendant City of Northwood's motion for summary judgment on plaintiffs' federal claims shall be denied. With respect to plaintiffs' motion for summary judgment, the motion shall be denied as to plaintiffs' federal claims (count I) and this Court shall grant summary judgment in favor of defendant City of Northwood on these claims. In light of these rulings, dismissing all of plaintiffs' claims arising under federal law, this Court will dismiss without prejudice plaintiffs' pendent state law claims. *See* 28 U.S.C. 1367(c)(3).

II. BACKGROUND

As noted above, this case arises out of the the City of Northwood City Council's ("City Council") denial of plaintiffs' application for a special use permit for a certain parcel of land. On

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(Cont'd)

official capacities, the suit actually is against the municipality, and the municipality is the real party in interest. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985) ("Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' . . . As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.") (citation omitted).

Appendix B

March 20, 1972, the City of Northwood changed the zoning for a sixty acre piece of real estate from "A-agricultural and Rural Residential" to "R-Suburban Residential". On February 21, 1973, the City of Northwood decided to issue a special use permit, allowing one hundred and ten condominium units to be constructed on this parcel of land. However, the special use permit restricted the area within which these condominium units could be built to a ten acre section of the land. Only twenty-three units were built. In addition, paved roads, curbs, and a sewer and water system were constructed.

In March 1987, plaintiffs in the instant action purchased the sixty acre parcel from the Chrysler Corporation. One condition of the sale was for the parcel to be officially divided into a ten acre plot and a fifty acre plot. In addition, the purchase agreement for the ten acre parcel states that plaintiffs intended to build condominium units on the ten acre parcel. However, the purchase agreement was not made contingent upon plaintiffs obtaining a special use permit to build the condominiums.[2] It also is evident from the purchase agreement that plaintiffs were represented by counsel when they entered into this purchase agreement.

On September 26, 1988, plaintiffs filed an application for the issuance of a special use permit, to build condominium units on the ten acre parcel, with the City of Northwood Planning Commission ('Planning Commission"). On October 13, 1998, the City Council met and decided to refer this matter to the Planning Commission. After a series of discussions between the Planning Commission and plaintiffs, and plaintiffs modifying their construction plans, the Planning Commission

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2. Under a City of Northwood Ordinance, condominiums only may be constructed if a special use permit has been issued.

recommended that the application for a special use permit be denied.

May 11, 1989, the City Council voted to deny plaintiffs' application for the following reasons: (1) water problems and poor maintenance of the existing constructed condominiums; (2) the value of the units were too low for the neighbors; (3) the concern that if the units did not sell, the units would become rental properties; and (4) the lack of a recreational area. On May 12, 1989, the City Attorney for Northwood wrote a letter inviting plaintiffs to reapply for a special use permit after plaintiffs had addressed the problems outlined above.

On May 31, 1989, plaintiffs reapplied and the City Council once again referred the matter to the Planning Commission. There is no dispute that the revised plans conformed to all of the zoning requirements. Furthermore, plaintiffs' attorney informed the City of Northwood, via a letter dated June 29, 1989, that it would not be economically feasible to rent the condominiums if they did not sell. The Planning Commission, on July 10, 1989, recommended that plaintiffs' application for a special use permit to construct condominium units be denied. The matter once again came before the City Council on August 24, 1989.

Section 1266.13 of the Northwood City Code provides the criteria that the City Council must consider in deciding whether to issue a special use permit. Section 1266.13 states that in order for a special use permit to issue the City Council must find that:

> (a) The special use is necessary or desirable for the public convenience at that location;
>
> (b) The special use is so designed, located

> and proposed to be operated that the public health, safety, and welfare will be protected;
>
> (c) The special use will not cause substantial injury to the value of other property in the neighborhood in which it is to be located; and
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> (d) The special use conforms to the applicable regulations of the district in which it is to be located, including yard and height restrictions, and also conforms to the requirements for off-street parking as set forth in Section 166.05. . . .

In addition, once the City Council decides that the criteria set forth above has been satisfied, § 1266.09 provides that the City Council *may* grant the special use permit.

At the August 24, 1989 City Council meeting, persons who lived in the neighborhoods surrounding the proposed building site, expressed concern that the lower priced condominiums would adversely affect the value of the neighboring property. In addition, it was apparent that the City Council was troubled by the lack of maintenance and care in the existing units. After reading the application three times, the City Council, without expressing any precise reasons, denied plaintiffs' second application for a special use permit.

Plaintiffs then appealed this denial to the Court of Common Pleas of Wood County, Ohio. The Court of Common Pleas held that the criteria set forth in Section 1266.13 of the City Code was satisfied by plaintiffs. Specifically, the Court of Common Pleas concluded that the only reason the City Council denied plaintiffs' application was because the proposed condominium project

allegedly would cause substantial injury to the value of the neighboring property. The Court of Common Pleas stated that:

> Injury to property value was an issue circumstantially discussed at Plan Commission & Council meetings. City officials were concerned about lack of maintenance and care for the existing multi-family units on the premises. Neighbors expressed concern that lower priced units as proposed would negatively affect their property value. However, there was no evidence that the new project proposed would negatively affect values of adjoining properties.
>
> . . . .
>
> Therefore, the Court finds the project herein meets the criteria set forth in the code. Council and the Commission meetings have not addressed issues with any intensity except for criteria c [impact on value of neighboring property] which was aggressively dealt with by the developer. There was a distinct absence of substantial inquiry into subsections a), b), & d) requirements.

Court of Common Pleas Opinion at 5-6.

The Court of Common Pleas then ordered that the special use permit be issued to plaintiffs. The City appealed this decision to Court of Appeals for Wood County ("Court of Appeals"). The Court of Appeals affirmed the Court of Common Pleas holding, based on the finding "that the trial court correctly determined that

there was no evidence to support the city's concerns that property values would lessen." Court of Appeals Opinion at 1. It is important to note that the standard applied by the Ohio courts was whether the City Council's decision was "supported by the preponderance of substantial, reliable and probative evidence." Ohio Rev. Code Ann. § 2506.04 (Anderson 1991). *See also* Court of Appeals Opinion at 5 (and cases cited therein). Specifically, the Court of Appeals stated that:

> The record before the trial court fails to include any evidence that the proposed development would substantially impair the value of neighboring property. There were 6 unsworn statements made by people at the administrative hearings who were "concerned" about property values, but there was absolutely no evidence that the concerns had any basis in fact. When a decision is made based on expressed but unsubstantiated concerns, then the decision is not based on reliable and probative evidence. Our review of the record reveals no substantial, reliable and probative evidence that the proposed use of the property would in any way harm the public health, safety or welfare of the community. Even in the more formal arena of the court of common pleas, the only "evidence" was that some people were opposed to the development.[3] Indeed the

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3. The recording device failed to operate properly at the City Council meeting when plaintiffs' renewed application for a special use permit was denied. As a consequence, the Court of Common Pleas took testimony as to what occurred at the City Council meeting.

> development is generally in harmony with current uses because the neighborhood now includes multi-family dwellings. Under these circumstances, we must conclude, as did the trial court, that the city council of Northwood arbitrarily denied the permit without any evidence to support that decision.

Court of Appeals Opinion at 6-7.

Although the Court of Appeals affirmed the Court of Common Pleas decision, the Court of Appeals remanded the matter to City Council in order for the City Council to determine if any restrictions should be placed on this special use permit. However, by the time the City Council issued the special use permit to plaintiffs, plaintiffs were not in a position financially to build the condominiums. Plaintiffs ended up having to sell the property in issue.

Plaintiffs instituted this action in federal court on August 21, 1990, advancing four theories of recovery: (1) a just compensation takings claim (count I); (2) a procedural due process claim (count I); (3) a substantive due process claim (count I);[4] and (4) tortious interference with a contract under

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4. This Court will refer to these first three claims as plaintiffs' "federal claims" because these claims all arise under the United States Constitution, and are brought pursuant to 42 U.S.C. § 1983. Plaintiffs have withdrawn their procedural due process claim wherein they contend that the denial of the special use permit destroyed the value of the property to such an extent that its amounts to a taking by eminent domain without due process of law and the relief to be accorded plaintiffs was the invalidation of the zoning decision. *See Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215-16 (6th Cir. 1992).

(Cont'd)

Ohio law. As noted above, this matter now is before this Court on defendants' motion for summary judgment, as well as plaintiffs' motion for summary judgment.

III. DISCUSSION

A. STANDARD OF REVIEW

Defendants and plaintiffs filed their respective motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Under Rule 56, summary judgment is appropriate only where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511 (1986) (citations omitted). In applying this standard, the Court must view all materials offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in the light most favorable to the non-moving party." *Id.* 106 S.Ct. at 2510.

(Cont'd)

Plaintiffs also allege in count I of their first amended complaint that all defendants, by their actions in this case, violated Article I, § 19 of the Ohio Constitution. Neither plaintiffs nor defendants addressed this claim in their respective motions. However, as this Opinion dismisses all of plaintiffs' federal claims, plaintiffs' claim under the Ohio Constitution will be dismissed without prejudice. *See* 28 U.S.C. § 1367(c)(3).

Appendix B

B. PLAINTIFF'S FEDERAL CLAIMS

1. Defendants' Motion For Summary Judgment

a. Absolute Immunity

Defendants first argue that they are entitled to absolute immunity because the City Council was acting in its "legislative capacity" when it denied plaintiffs' application for a special use permit. *See Shoults v. Laidlaw*, 886 F.2d 114, 117 (6th Cir. 1989) ("local legislatures are protected by absolute immunity when they act in their legislative capacities."); *Haskell v. Washington Twp.*, 864 F.2d 1266, 1277-78 (6th Cir. 1988). Defendants' argument is not well taken in two respects.

First, the Court of Appeals for Wood County, in its decision affirming the Court of Common Pleas, stated that:

> This case is somewhat unusual in that the authority to grant or deny a special use permit is given by the Northwood Planning and Zoning Code to city council, not the Northwood Planning and Zoning Commission which is an administrative agency. However, it had been held that the actions of a legislative body such as a city council may be subject to review in the same manner as those of an administrative body if the council acts in an administrative or quasi-judicial capacity.... *Appellant city has conceded that the city council, when considering an application for a special use permit, acts in an administrative or quasi-*

> *judicial capacity. Our review, then, shall be as though the city council were in fact an administrative agency and not a political or legislative body.*

Court of Appeals Opinion at 4 (emphasis added).

Second, even without considering this prior statement by the Ohio Court of Appeals, it is clear that under Sixth Circuit case law defendants were not acting in their legislative capacity when they denied plaintiffs' application for a special use permit. As explained in *Haskell, supra,* "[i]f the underlying purpose of zoning activity is to establish general policy, it is legislative.... If however, the action singles out specific individuals and affects them differently from others, it is administrative." *Haskell,* 864 F.2d at 1278 (citations omitted) (internal quotation marks omitted).

One of the cases cited by the *Haskell* Court was *Scott v. Greenville County,* 716 F.2d 1409 (4th Cir. 1983). The plaintiff in *Scott* brought suit against various defendants, including the city council, claiming that his constitutional rights had been violated when the city council wrongfully withheld a building permit for low-income housing. *Id.* at 1411. In holding that the members of the defendant city council acted in a non-legislative capacity when ruling on the plaintiff's building permit, the Fourth Circuit stated that "[w]hen local zoning officials do more than adopt prospective, legislative-type rules and take the next step into the area of enforcement, they can claim only the executive qualified immunity appropriate to that activity.[]" *Id.* at 1423 (footnote omitted).

In the case at bar, the City Council members, like the city

council members in *Scott*, took the next step into the area of enforcement of zoning rules, when the City Council acted upon plaintiffs' renewed application for a special use permit. Thus, defendants are not entitled to absolute immunity in the case bar, because they were not acting in their legislative capacity.

b. Qualified Immunity

Defendants also argue that they are entitled to summary judgment based on the doctrine of qualified immunity. All the parties agree as to the law that is to be applied to defendants' qualified immunity claim. First, this Court must consider whether defendants violated a clearly established right when they denied plaintiffs' application for a special use permit. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Second, this Court must determine, as a matter of law, whether a reasonable person under the same circumstances would have known that his or her conduct violated plaintiffs' clearly established right. *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 3038-3039, 97 L.Ed.2d 523 (1987).

The parties fail to address, however, the scope of qualified immunity. First, qualified immunity does not apply to a municipality,[5] and thus, the City of Northwood is not entitled to summary judgment on the grounds of qualified immunity. Second, qualified immunity only attaches to the individual defendants when they are sued in their individual capacity. *Harlow, supra.* Here, the individual council members have been sued in both their individual and official capacities, and thus their qualified immunity defense only pertains to their personal

5. *Owen v. City of Independence*, 445 U.S. 622, 638, 100 S.Ct. 1398, 1409, 63 L.Ed.2d 673 (1980) ("We hold . . . that the municipality may not assert the good faith of its officers or agents as a defense to liability under 1983.").

liability. As noted above, the suit against the City Council members in their official capacities, is a suit against the City of Northwood itself.

Finally, it is critical to isolate the precise constitutional violation plaintiffs are claiming here. Plaintiffs have dropped their due process claim, in light of the relief obtained in state court. This leaves us with plaintiffs' claim for taking of property without just compensation and plaintiffs' claim based on substantive due process. With respect to the individual defendants' qualified immunity argument, plaintiffs rely exclusive on their substantive due process claim. Moreover, before reaching the merits of any qualified immunity claim, it is the duty of this Court to determine whether the action taken by the individual City Council members was sufficient to constitute a violation of plaintiffs' substantive due process rights. *Siegert v. Gilley*, __ U.S. __, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277, 287 (1991); *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1035 (6th Cir. 1992).

Here, the individual council members do not dispute that plaintiffs had a clearly established constitutional right at the time the decision was made denying plaintiffs' application for a special use permit: plaintiffs had a clearly established right not to be subject to an arbitrary or an irrational zoning decision. *See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 263, 97 S.Ct. 555, 562, 50 L.Ed.2d 450 (1977) (citation omitted). As recently explained by the Sixth Circuit:

> To establish a violation of substantive due process, a plaintiff must first establish the existence of a constitutionally-protected

> property or liberty interest." Thus, before [plaintiffs] can establish a violation of substantive due process [they] must demonstrate that [they] had a property interest in the use of the . . . [ten acre] parcel as a condominium complex. To do this, [plaintiffs] must prove that [the City Council] did not have the discretion to deny [plaintiffs'] use of the land as a condominium complex if [they] complied with certain minimum, mandatory requirements. . . . If the [City Council] had the discretion to deny [plaintiffs] a [special use permit] for a condominium complex even if [they] complied with certain minimum, mandatory requirements, the [plaintiffs] would not have a "legitimate claim of entitlement" or a "justifiable expectation" in the approval of [their application.]

Silver, 966 F.2d at 1036 (citation omitted).

The *Silver* Court examined whether the plaintiff had either a legitimate claim of entitlement or a justifiable expectation in the approval of a condominium plan, where the applicable zoning regulations provided that such a plan could be approved if its use was deemed desirable. In addition, the board of zoning appeals in *Silver* had to consider:

> whether the proposed use [wa]s (1) *harmonious* and *appropriate* in appearance with the existing or intended character of the general vicinity; (2) *hazardous* or *disturbing*

> to existing or future adjoining neighborhoods; or (3) *detrimental* to the property in the immediate vicinity.

Id. (emphasis in original). The *Silver* Court found "that the Zoning Resolution as a whole g[ave] the Board broad discretion to issue a conditional zoning certificate even if the property owner can demonstrate that the use is conditionally permitted under the Zoning Resolution." *Id.* Based on this conclusion, the court held that the plaintiff in *Silver* "possessed neither a legitimate claim of entitlement to the zoning certificate nor a justifiable expectation that the Board would issue the certificate." *Id.* As a consequence, the plaintiff did not have a property interest that could support a substantive due process claim. *Id.*

In the case at bar, this Court finds that plaintiffs possessed neither a legitimate claim of entitlement to the special use permit nor a justifiable expectation that the City Council would issue the special use permit. As stated above, the relevant zoning regulation provided that "a special use permit may be granted in any of the established zoning districts" (§ 1266.09), if:

> (a) The special use is necessary or desirable for the public convenience at that location;
>
> (b) The special use is so designed, located and proposed to be operated that the public health, safety, and welfare will be protected;
>
> (c) The special use will not cause substantial injury to the value of other property in the neighborhood in which it is to be located; and

> (d) The special use conforms to the applicable regulations of the district in which it is to be located, including yard and height restrictions, and also conforms to the requirements for off-street parking as set forth in Section 166.05. . . .

§§ 1266.09 (emphasis added) & 1266.13.

This Court finds that this zoning regulation does not vest plaintiffs' with a legitimate claim of entitlement that the special use permit would issue. Plaintiffs' argue that § 1266.13 does not give the City Council any discretion once the City Council has determined that the four criteria list in that Section have been meet. However, § 1266.09 provides the City Council with such discretion. As noted above, § 1266.09 states that "a special use permit *may* be granted in any of the established zoning districts." (emphasis added). The use of the word "may" provides sufficient discretion to undercut any argument that the language of the zoning regulations vested in plaintiffs an entitlement to the special use permit being issued once the four factors in § 1266.13 were fulfilled.

Plaintiffs also claim, based on the prior issuance of a special use permit to build condominiums on this same piece of property in the early 1970's, that they had a justifiable expectation that a special use permit would be issued, and thus they have a protected interest.[6] Plaintiffs rely on *Nasierowski Brothers Inv. Co. v. City*

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6. Plaintiffs also underscore the point that it was the City of Northwood that invited plaintiffs to reapply as soon as certain problems were addressed. However, a similar argument was implicitly rejected by the court in *Silver*, 966 F.2d at 1032, 1036 (holding that plaintiffs did not have a property or liberty interest in a (Cont'd)

of Sterling Heights, 949 F.2d 890 (6th Cir. 1991), in support of their conclusion that they have a protected property interest in the special use permit being approved. *Nasierowski* is distinguishable, however, in many important aspects.

First, the plaintiff in *Nasierowski* relied upon the City's representation that the subject parcel of land was within the "general business district" zoning classification when the plaintiff purchased the property. *Id.* at 891. Here, plaintiffs did not rely on any express representation by the City of Northwood that a special use permit would be issued for them to build more condominium units on this piece of property. Second, as stated by the *Nasierowski* Court:

> First, and perhaps foremost, [the plaintiff] expressly conditioned the purchase of the property on his obtaining a favorable zoning opinion from the City. It is clear that Nasierowski would *not* have purchased the land unless the City had first advised him that, as of right, he was authorized to develop the parcel along the proposed lines.

Id. at 897. In the case at bar, conspicuously absent from the purchase agreement was a clause making the purchase of the land contingent upon plaintiffs obtaining a special use permit. It is clear that plaintiffs intended to build condominiums on this piece

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(Cont'd)
conditional zoning permit, notwithstanding the fact that after the planning commission refused to issue the permit, the commission informed the plaintiff that 14 issues had to be addressed before the commission would reconsider the proposal and plaintiffs sufficiently addressed these problems).

of property, based on the fact that some condominiums already had been built on this piece of property. This is insufficient, however, to establish a property or liberty in plaintiff in having the special use permit granted.

In addition, the prior special use permit was approved approximately 15 years before plaintiffs' applied for their special use permit. While this Court does not question that plaintiffs' assumed such permit would issue again, this Court cannot state that plaintiffs had a justified expectation in the City Council issuing a special use permit. This is especially true where, as here, there were substantial problems with the original development.

Therefore, this Court finds that plaintiffs' did not have either a property or a liberty interest in being able to use the ten acre parcel to construct new condominium units. Therefore, there has been no violation of plaintiffs' substantive due process rights in the case bar.

Assuming, for the sake of completeness, that plaintiffs' did have either a property or a liberty interest in building condominiums on this piece of property, this Court finds that plaintiffs have not suffered a *violation* of a clearly established constitutional right. As noted above, the parties agree that plaintiffs' had a clearly established right to be free from arbitrary and irrational zoning decisions. *Village of Arlington Heights, supra*. The question thus becomes whether this constitutional right was violated. For the reasons to follow, this Court concludes that this constitutional right was not violated in the case at bar.

In order to prove a constitutional violation based on a zoning decision, a plaintiff must prove that the decision was " 'arbitrary and capricious . . .' in the *strict* sense, meaning 'that there is no

rational basis for the . . . decision.' " *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221 (footnote and citations omitted). As the *Pearson* Court explained:

> The use of the term 'arbitrary and capricious' in this context causes considerable confusion, because these same terms are also used to describe the scope of review by state courts of state administrative action.[] Therefore, it must be emphasized that the state court scope of review of a decision of a state administrative agency is far broader than the federal scope of review under substantive due process.
>
> In some states, a state court may set aside state administrative action as being "arbitrary and capricious" on the grounds, among others, *that it is not supported by substantial evidence*.[] No such ground may be used by the federal court in reviewing state administrative action in connection with a federal substantive due process attack, however. In the federal court the standard is a much narrower one.[] *The administrative action will withstand substantive due process attack unless it "is not supportable on any rational basis" or is "willful and unreasoninq action without consideration and in disregard* of the facts or circumstances of the case."[]

Pearson, 961 F.2d at 1221 (footnotes, citations, and internal quotation marks omitted) (emphasis added).[7]

Plaintiffs' make a two-fold argument in support of their conclusion that their constitutional right to be free from arbitrary and irrational zoning decisions was violated when the City Council refused to grant plaintiffs' application for a special use permit. First, plaintiffs argue that the Ohio courts' decisions in this case have collateral estoppel effect on this claim. Plaintiffs' argument is not well taken.

As plaintiffs noted in their brief in support of their motion for summary judgment, under Ohio law, collateral estoppel "precludes the relitigation, in a second action, of an issue actually and necessarily litigated and determined in a prior action where all the parties in the first action are parties in the second action. Although the cause of action differs, the prior judgment precludes relitigating the same issue in the second suit." Plaintiffs' brief in support at 7 (citations omitted). Of special importance to the issue before this Court, is the requirement that

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7. The *Pearson* Court also noted that:

> [I]t is extremely rare for a federal court properly to vitiate the action of a state administrative agency as a violation of substantive due process. The vast majority of such attacks may readily be disposed of on summary judgment . . . thus keeping interference by federal courts with local government to a salutary minimum. Review of state administrative action is primarily a matter for state courts, which quite properly have a much broader scope of review under state law.[]

Pearson, 966 F.2d at 1222-23 (footnote omitted).

the issue previously decided was actually and necessarily litigated and determined in the prior action.

The requirement is not satisfied in this action. The issued determined by the Ohio courts was whether there was substantial, probative, and reliable evidence to support the City Council's decision not to issue the special use permit. While it is clear that this issue was *determined* by the Ohio courts, it is equally clear that this is not the issue before this Court. As set forth above, the issue before this Court is whether the administrative action was not supported on any rational basis or was willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case. Again, as noted above, the federal review of such action is much narrower than state court review.

Thus, while a federal court determination that a zoning decision violated a plaintiff's substantive due process rights to be free from arbitrary and irrational zoning decisions, *a fortiori* means that such a zoning decision would fail under a less stringent state court review, the opposite is not true. In other words, the issue of whether the City Council's action was either not supported by any rational basis or was willful and unreasonable action, taken without consideration and in disregard of the facts and circumstances of the case, was not an issue actually and necessarily litigated and determined in the Ohio courts. Therefore, the Ohio courts' determination do not have collateral estoppel effect on the litigation presently before this Court.

Plaintiffs' second argument is that the facts in this case show that plaintiffs have suffered a violation of their substantive due process rights. Within this argument, plaintiffs rely on two

separate grounds. First, plaintiffs contend that City Council's decision was not support by any rational basis. Although the only facts before the City Council were expressed, but unsubstantiated concerns, regarding how the new development was going to adversely affect the value of the neighboring property, this Court finds that this constitutes a rational basis for the City Council's decision. *See Pearson*, 756 F.Supp. 314, at 318 (E.D. Mich 1991), *affirmed*, 966 F.2d at 1224 (affirming the grant of summary judgment in favor of the defendant on the plaintiff's substantive due process claim, where the deposition of the members of city council revealed that the city council was not swayed by hard evidence that the proposed plan would have an adverse impact on the health, safety, and welfare of the city, rather the city counsel was swayed by complaints of citizens regarding traffic problems and over developed commercialization).

Plaintiffs also argue that the decision was a willful and an unreasonable action, taken without consideration, and in disregard, of facts or circumstances of the case. The underpinning of plaintiffs' argument is that the City Council failed to consider to criteria set forth in § 1266.13; criteria that the City Council is mandated to examine. Plaintiffs assert that the Ohio courts have declared that the City Council failed to employ the criteria set forth in § 1266.13, and thus they acted willfully, unreasonably, and in disregard of the facts or circumstances in this case. This Court disagrees with plaintiffs' reading of the state court opinions.

The state courts did not state that the City Council failed to examine the requisite criteria. The state courts noted that the only factor which the City Council addressed was the affect the proposed project had on the value of the neighboring properties. In a situation where a decision making body finds that one of

several facts that must be satisfied, is not satisfied, it is quite rational and reasonable for that decision making body only to address that one precise factor. There is no evidence that the City Council failed to utilize the appropriate zoning regulation here. Therefore, this Court finds that the City Council's decision denying plaintiffs' application for a special use permit was not a willful and an unreasonable action, taken without consideration, and in disregard, of facts or circumstances of the case. Thus, plaintiffs cannot show that their substantive due process rights to be free from arbitrary and irrational zoning was violated by the actions of the City Council in the case at bar.

Furthermore, even if plaintiffs' can show that their clearly established right has been violated, it is the opinion of this Court that a reasonable person in the same position as the members of City Council would not have known that they were violating plaintiffs' clearly established constitutional right. Accordingly, the defendants sued in their individual capacities have qualified immunity in this case. Therefore, the individual defendants' motion for summary judgment is GRANTED.

c. Good-Faith Immunity Under Ohio Law

The City next argues that it has immunity from plaintiffs' federal claims based on Ohio's good-faith immunity defense established in *C & D Partnership v. Gahanna*, 15 Ohio St.3d 359, 364, 474 N.E.2d 303 (1984). This argument is without merit. As noted by plaintiffs' in their response brief to defendants' motion for summary judgment, in *Potter v. Troy*, 78 Ohio App.3d 373, 604 N.E.2d 828, 837 (1992), the Ohio Court of Appeals held that "[t]he effect of [Ohio Revised Code] . . . § 2744.03, with the exception of the common law immunity preserved by . . . § 2744.03(A)(7), is to abrogate all other immunity provided

under common law." Subsection (a)(7) preserves common law immunity for the legal officers of a political subdivision, and thus in not implicated by the facts in the instant case. As a consequence, "good faith" immunity under *C & D Partnership* is no longer a valid defense under Ohio law. Accordingly, defendant City of Northwood's motion for summary judgment is DENIED.

2. Plaintiff's Motion For Summary Judgment

a. Substantive Due Process

The only remaining defendant in plaintiffs' substantive due process claim is the City of Northwood. For the reasons set forth above, finding that plaintiffs' did not have a protected property or liberty interest and that plaintiffs' did not suffer a violation of their substantive due process rights, plaintiffs' motion for summary judgment on their substantive due process claim is DENIED. In addition, even though defendant City of Northwood did not move for summary judgment on plaintiffs' substantive due process claim on the ground that there are no genuine issues of material fact and defendant City of Northwood is entitled to judgment as a matter of law,[8] this Court will *sua sponte* granted summary judgment in favor of defendant City of Northwood.[9] In light of the aforementioned analysis, this Court finds that there is no genuine issue of material fact with respect to plaintiffs'

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8. Defendant City of Northwood moved for summary judgment on the following grounds: (1) absolute immunity; (2) qualified immunity; and (3) good-faith immunity under Ohio law.

9. *See Celotex v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986) ("district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence.") (citations omitted).

substantive due process claim and that defendant City of Northwood is entitled to judgment as a matter of law on this claim.[10]

b. Taking and Just Compensation Claim

This Court finds that plaintiffs' taking claim is not ripe for determination.[11] The law is well settled that "if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until the owner has used the state procedure and been denied compensation." *Silver*, 966 F.2d at 1034 (citations omitted). The only exception to this rule is where the plaintiff can show that the state procedures for obtaining just compensation are inadequate. *Id.* at 1035.

There is no dispute that Ohio law provides a procedure for plaintiffs to seek just compensation on this claim. As the *Silver* Court noted:

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10. In light of this holding, this Court need not address defendants' argument that: (1) the Linsenmeyers are not real parties in interest under Fed. R. Civ. P. 17(a); (2) that plaintiffs' cannot recover damages outside of the partnership; and (3) that plaintiffs' are not entitled to punitive damages.

11. As described by the Sixth Circuit in *Pearson*, *supra*, in a taking of property without just compensation claim:

> [the] plaintiff claims that the zoning applied to his land constitutes a taking of his property without just compensation in contravention of the Fifth Amendment, the remedy sought being the just compensation.

Pearson, 961 at 1215.

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> Ohio law provides a procedure for obtaining just compensation for a governmental taking. If a property owner can demonstrate that the enforcement of a zoning regulation results in an unconstitutional taking, the owner may seek mandamus from a state court directing state officials to institute eminent domain proceedings to determine just compensation.

Id. (citations omitted).

Plaintiffs allege that the Ohio procedure is inadequate because plaintiffs only will be able to recover for the value of the property and plaintiffs cannot recover for damages which allegedly resulted from the City's interference with a business relationship. That is, plaintiffs are seeking to recover damages suffered outside of the scope of the value of the property.

Plaintiffs argument in unavailing. In a just compensation action in federal court, plaintiffs' recovery under the fifth amendment is as follows:

> "[J]ust compensation" means the full monetary equivalent of the property taken.[] The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.[] In enforcing the constitutional mandate, the Court at an early date adopted the concept of market value: *the owner is entitled to the fair market value of* the property[] at the time of the taking.[]

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United States v. Reynolds, 397 U.S. 14, 16, 90 S.Ct. 803, 805 (1970) (footnotes omitted) (emphasis added).

Therefore, under both Ohio law and fifth amendment law, plaintiffs may only recover for the value of the property. Thus, this Court cannot comprehend how Ohio law does not adequately compensate plaintiffs for the alleged taking of their property without just compensation. If plaintiffs desire to obtain damages outside of the value of property at the time of the taking, they must proceed under a different legal theory, which plaintiffs have done in the case at bar by pleading a cause of action for interference with a business relationship.

Accordingly, this Court finds that plaintiffs have not employed the available procedure under Ohio law to obtain relief on their taking of property without just compensation claim. In addition, notwithstanding the fact that plaintiffs have pleaded that this state procedure is inadequate, plaintiffs have not come forward with any convincing evidence that the state procedure actually is inadequate. As a consequence, this Court holds that plaintiffs fifth amendment just compensation claim is not ripe for a determination by this Court. Therefore, this claim will be dismissed without prejudice.

C. PLAINTIFFS' STATE LAW CLAIMS

1. Interference With A Business Relationship

Plaintiffs claim that defendants interfered with a business relationship that plaintiffs had established with a developer is a claim that is based on state law. Because this Opinion has dismissed all of plaintiffs claims brought under federal law, pursuant to 28 U.S.C. 1367(c)(3), this Court will dismiss this claim without prejudice.

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2. Plaintiffs' Claim Under The Ohio Constitution

Plaintiffs, in their first amended complaint, allege that defendants' actions also violated Article I, § 19 of the Ohio Constitution. Neither plaintiffs nor defendants briefed this cause of action in their respective motions for summary judgment. This Court likewise will dismiss this claim without prejudice under 28 U.S.C. § 1367(c)(3), in light of the rulings in this Opinion dismissing all of plaintiffs' claims under federal law.

IV. CONCLUSION

In light of the aforementioned analysis, IT IS HEREBY ORDERED that Defendants Crane's, Belknap's, Melnyk's, Lark's, and Blair's motion for summary judgment on plaintiffs' federal claims is GRANTED;

IT IS FURTHER ORDERED that defendant City of Northwood's motion for summary on plaintiffs' federal claims is DENIED;

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment is DENIED; however, this Court *sua sponte* GRANTS summary judgment in favor of defendant City of Northwood on plaintiffs' substantive due process claim;

IT IS FURTHER ORDERED that plaintiffs' fifth amendment taking of property without just compensation claim is DISMISSED WITHOUT PREJUDICE;

IT IS FURTHER ORDERED that plaintiffs' claims brought under Ohio law are DISMISSED WITHOUT PREJUDICE.

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IT IS SO ORDERED.

s/ Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Dated: October 29, 1993

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 3:90-CV-7431
HON. LAWRENCE P. ZATKOFF

TRIOMPHE INVESTORS, an Ohio General Partnership, JAMES D. HAYNES, individually and as a General Partner, STEVEN J. LINSENMEYER, individually and as a General Partner, and JAN LINSENMEYER, individually and as a General Partner,

Plaintiff,

vs.

CITY OF NORTHWOOD, JAMES CRANE, PATRICIA BELKNAP, JOHN MELNYK, RAYMOND LARK, and JOHN E. BLAIR,

Defendants.

JUDGMENT

IT IS ORDERED AND ADJUDGED that this action is hereby DISMISSED pursuant to the Memorandum Opinion and Order dated October 29, 1993.

Dated at Detroit, Michigan, this 29th day of October, 1993.

Appendix B

JOHN P. MAYER
CLERK OF THE COURT

BY: s/ R.P. Nastwold

APPROVED:

s/ L.P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Pursuant to Rule 77 (d) FRCiv.P.
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FOLLOWING:
Atty Jack Zouhary
Atty Ralph Denune, III

on Oct. 29, 1993
R.P. Nastwold
DEPUTY CLERK